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MUHD ZULKIFLI ABD GHANI

v.

PP

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FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASHIM YUSOFF FCJ
ABDULL HAMID EMBONG FCJ
[CRIMINAL APPEAL NO: 05-69-2010 (C)]

C

14 DECEMBER 2011

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Trafficking in 22,935 grams of cannabis - Conviction and sentence - Appeal against - Factors to consider - Whether Court of Appeal misdirected itself - Whether balance of convenience grossly against acquittal*

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The appellant was charged in the High Court for trafficking 22,935 grams of cannabis. At the end of the trial, he was acquitted and discharged. The prosecution appealed against the said decision. The Court of Appeal allowed the prosecution's appeal and set aside the order of acquittal and substituted it with an order of conviction and sentenced the appellant to death. Hence, this appeal. The main ground of appeal was whether the Court of Appeal had misdirected itself when it interfered with the findings of the High Court. It was argued that the appellant had no knowledge of the presence of the two sacks containing the cannabis in his van.

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Held (dismissing the appeal; affirming conviction and sentence)

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Per Hashim Yusoff FCJ delivering the judgment of the court:

(1) The two white plastic sacks found in the van were large in size and could not have been missed by anyone as they were not covered or hidden from sight. It was impossible that anybody could have placed the two sacks in the van during the very short space of time wherein the appellant claimed he had gone to the toilet and had left the van unlocked. Further, the appellant's wife testified that he had told her he was going out to attend a "kenduri" function while during the trial, he

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said that he had gone out that night in order to take something which one Din Haq had requested him to do. The appellant had deliberately lied to his own wife. This showed that the appellant knew about his unlawful act which he was planning to do. (paras 7 & 8)

(2) Contrary to what the appellant had testified, the second accused, Eliah, had testified that he did not know the appellant before they met at the Sg Karang mosque. This material contradiction did not support the appellant's evidence that he had received a call from Eliah and later went to pick him up by the roadside near Beserah and that they went together in the van to the Sg Karang mosque. This material contradiction had affected the appellant's credibility as a witness. (para 9)

(3) The absence of the fingerprint evidence regarding the exhibits found in the van did not affect the prosecution's case as there was ample other evidence to show that only the appellant and Eliah were found in the van driven by the appellant at the relevant time and that the appellant was also the owner of the said van. There was no statutory provision requiring the prosecution to produce any fingerprint report especially when there was enough other evidence to connect the appellant with the drugs. (para 10)

(4) Upon being questioned by the customs officer as to the contents of the two sacks, the appellant himself had said it was "daun". This fact clearly showed that the appellant was aware of the nature of the contents of the two sacks. There was no mention by the appellant at that material time that he was not aware of the two sacks found conspicuously in his van. (para 12)

(5) If the learned trial judge had taken into account the relevant factors, and properly weighed the defence of mere denial with that of the prosecution evidence, he would have come to a different conclusion. The Court of Appeal had correctly interfered with the findings of facts made by the trial judge as the balance of evidence was grossly against the acquittal of the appellant. There was no misdirection by the Court of Appeal. (para 13)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu telah dituduh di Mahkamah Tinggi dengan mengedar 22,935 gram ganja. Di akhir perbicaraan, beliau telah dibebas dan dilepaskan. Pihak pendakwaan merayu terhadap keputusan
B tersebut. Mahkamah Rayuan telah membenarkan rayuan pihak pendakwaan dan mengenepikan perintah pembebasan dan menggantikannya dengan perintah sabitan dan menjatuhkan hukuman mati ke atas perayu. Oleh itu, rayuan ini. Alasan utama rayuan adalah sama ada Mahkamah Rayuan telah tersalah arah
C apabila ia campur tangan dengan penemuan Mahkamah Tinggi. Ia dihujahkan bahawa perayu tidak mempunyai pengetahuan mengenai kewujudan guni-guni yang mengandungi ganja di dalam van beliau.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)
D **Oleh Hashim Yusoff HMP menyampaikan penghakiman mahkamah:**

(1) Kedua-dua guni plastik putih yang dijumpai di dalam van adalah besar saiznya dan tidak mungkin terlepas perhatian oleh
E sesiapa kerana ia tidak dilindungi atau tersembunyi daripada penglihatan. Ia adalah mustahil bahawa sesiapa boleh meletakkan kedua-dua guni itu di dalam van pada ruang masa yang singkat di mana perayu mendakwa beliau telah pergi ke tandas dan telah meninggalkan van tanpa dikunci. Seterusnya,
F isteri perayu mengatakan bahawa perayu telah memberitahunya bahawa beliau keluar untuk menghadiri kenduri manakala semasa perbicaraan, perayu berkata beliau telah keluar malam itu untuk mengambil sesuatu dari seseorang bernama Din Haq yang telah meminta beliau berbuat demikian. Perayu telah
G dengan sengaja berbohong kepada isterinya. Ini menunjukkan bahawa perayu mengetahui bahawa beliau memang bercadang melakukan perbuatan yang menyalahi undang-undang.

(2) Bertentangan dengan apa yang perayu telah menyatakan,
H tertuduh kedua, Eliah, telah menyatakan bahawa dia tidak mengenali perayu sebelum mereka berjumpa di masjid Sg Karang. Percanggahan material ini tidak menyokong keterangan perayu bahawa beliau telah menerima panggilan dari Eliah dan selepas itu telah mengambil Eliah dari tepi jalan berdekatan
I dengan Beserah dan mereka telah bersama-sama pergi ke masjid Sg Karang di dalam van tersebut. Percanggahan material ini telah menjejaskan kredibiliti perayu sebagai saksi.

(3) Ketiadaan keterangan cap jari mengenai eksibit-eksibit yang didapati di dalam van tidak menjejaskan kes pendakwaan kerana terdapatnya bukti cukup yang lain yang menunjukkan bahawa hanya perayu dan Eliah dijumpai di dalam van yang dipandu oleh perayu pada masa yang relevan dan perayu juga pemilik van tersebut. Tidak terdapat peruntukan berkanun yang memerlukan pihak pendakwaan menghasilkan mana-mana cap jari terutama sekali apabila terdapat keterangan lain yang memadai untuk menghubungkan perayu dengan dadah-dadah tersebut.

(4) Apabila disoal siasat oleh pegawai kastam mengenai kandungan-kandungan di dalam kedua-dua guni itu, perayu sendiri telah menjawab "daun". Fakta ini dengan jelasnya menunjukkan bahawa perayu menyedari sifat kandungan kedua-dua guni itu. Tidak disebut oleh perayu pada masa material itu bahawa beliau tidak menyedari mengenai dua guni yang telah ditemui di dalam van perayu.

(5) Jika yang arif hakim bicara telah mengambil kira faktor-faktor relevan, dan telah mempertimbangkan pembelaan penafian semata-mata dengan keterangan pihak pendakwaan, yang arif hakim bicara akan membuat kesimpulan yang berbeza. Mahkamah Rayuan betul apabila ia campur tangan dengan penemuan fakta-fakta yang dibuat oleh yang arif hakim bicara kerana pertimbangan keterangan adalah terlampau bertentangan dengan pembebasan perayu. Tidak terdapat salah arah mengenai keputusan Mahkamah Rayuan.

Case(s) referred to:

Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2004] 3 CLJ 737 FC ***(refd)***

Lai Kim Hon & Ors v. PP [1980] 1 LNS 197 FC ***(refd)***

Syed Ali Syed Abdul Hamid & Anor v. PP [1982] CLJ 188; [1982] CLJ (Rep) 340 FC ***(refd)***

For the appellant - Richard Bong Chong Fook (Hisyam Teh Poh Teik with him); M/s Bong & Co

For the respondent - Awg Armadajaya Awg Mahmud SFC; AG's Chambers

[Editor's note: For the Court of Appeal judgment, please see PP lwn. Muhd Zulkifli Abd Ghani & Satu Lagi [2011] 2 CLJ 772]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Hashim Yusoff FCJ:

[1] The appellant together with one Eliah bin Jusoh were charged for trafficking 22,935 grams of cannabis. They were both
B acquitted and discharged at the end of the trial before the Kuantan High Court on 28 February 2003. The prosecution appealed against the said decision of the High Court. Since the notice of appeal against Eliah could not be served, that appeal was struck out, and the appeal proceeded only against the
C appellant. The Court of Appeal allowed the prosecution's appeal and set aside the order of acquittal and substituted it with an order of conviction and sentenced the appellant to death. Hence this appeal that is before us.

D **Facts**

[2] The facts of this case are as found at paras. 4 to 11 in the grounds of judgment of the Court of Appeal and we do not intend to reproduce them here.

E **The Appeal**

[3] Learned counsel for the appellant, in his usual candour and brevity canvassed only one main ground of appeal ie, that the Court of Appeal had misdirected itself when it interfered with the
F findings of fact of the High Court.

[4] Reference was made to para. 40 of the grounds of judgment of the Court of Appeal wherein it was said, "Pembelaan responden, pada pendapat kami, adalah satu rekaan semata-mata
G dan tidak menimbulkan keraguan yang munasabah ke atas kes pendakwaan bahawa dadah tersebut berada di dalam milikan responden."

[5] It was argued that the Court of Appeal had seriously
H misdirected itself in coming to the above conclusion because the defence of the appellant was that he had no knowledge of the presence of the two sacks in his van. According to the appellant's testimony, one Abang Din Haq had telephoned him while he was in his house requesting him to take or carry something and that
I later, one Eliah would call the appellant regarding the matter.

[6] Learned counsel for the appellant submitted that Eliah did call the appellant telling him that he was by the roadside near Beserah, near a big tree. The appellant then went to fetch Eliah at the said place and both of them proceeded in the van to Masjid Sungai Karang. At the said mosque, it was alleged by the appellant that he had left his van unlocked while he went to the toilet for about 3-4 minutes and that thereafter when he and Eliah proceeded on their way to Kuantan, they were stopped by the customs raiding party along the road.

[7] Several reasons were given by the Court of Appeal as to why they disagreed with the findings of fact by the learned trial judge pertaining to the acquittal of the appellant. The Court of Appeal found that while the learned trial judge found there was a *prima facie* case made out against the appellant yet his Lordship had accepted the appellant's explanation, that he never knew about the presence of the two sacks of cannabis found in his van, as plausible, based on his demeanour while giving his testimony in court. The Court of Appeal disagreed with this finding by the learned trial judge because it found that the two white plastic sacks which were found in the van, as can be seen in the photo exhs. P5 5-13 were large in size and could not have been missed by anyone as they were not covered or hidden from sight. The Court of Appeal also found that while being cross-examined, the appellant said he left the van to go to the toilet for 2-3 minutes only and there was no obstruction between the van and the toilet. In view of their big size, the Court of Appeal found that it was impossible that anybody could have placed the two sacks in the van during the very short space of time. There was no suggestion by the defence as to who else could have put the two sacks in the van.

[8] The Court of Appeal also found that the appellant's testimony that he had left the van unlocked with its ignition key in the van to be highly suspect. More so when the appellant's wife herself had testified that the appellant had told her that he was going out to attend a kenduri function while during the trial he said that he had gone out that night in order to take something which one Din Haq had requested him to do. The Court of Appeal found on this point that the appellant had deliberately lied to his own wife. This, the Court of Appeal concluded, showed that the appellant knew about his unlawful act

which he was planning to do. The Court of Appeal cited the observation of Salleh Abas, FJ (as he then was) in *Syed Ali Syed Abdul Hamid & Anor v. PP* [1982] CLJ 188; [1982] CLJ (Rep) 340 at pp. 345-346 as follows:

> In other jurisdictions a false statement made by an accused person concerning the surrounding circumstances in which an offence was committed whilst he had an opportunity to commit the offence can be regarded as a corroboration of the evidence against him. *Eade v. The King* and also *Regina v. Lucas (Ruth)*. We accept the decisions in these cases to be good law. In this case we hold that the representation he made to PW4 regarding the purpose of borrowing the car was a deliberate lie and is therefore a corroborative evidence against him for which he must explain. Such lie is a reflection of his consciousness of guilt as regards the use he intended to make of the car in question.

[9] The Court of Appeal also found that the material contradiction between the testimony of the 2nd accused, Eliah and the appellant had affected the credibility of the appellant. Contrary to what the appellant had testified, Eliah instead said that he was already at the Sg Karang mosque when he got acquainted with the appellant and later got a lift in his van to go to Kuantan. Eliah testified that he did not know the appellant before they met in the said mosque. We agree with the Court of Appeal that this material contradiction does not support the appellant's evidence that he had received a call from Eliah and later went to pick him up by the road side near Beserah and that they went together in the van to the Sg Karang mosque. It would therefore not be wrong for the Court of Appeal to say that this material contradiction had affected the appellant's credibility as a witness. There is no evidence to suggest why Eliah did not support the testimony of the appellant.

[10] The Court of Appeal also concluded that the absence of the fingerprint evidence regarding the exhibits found in the van did not affect the prosecution case as there was ample other evidence to show that only the appellant and Eliah were found in the van driven by the appellant at the relevant time and that the appellant was also the owner of the said van. We agree with the Court of Appeal, as there is no statutory provision requiring the prosecution to produce any fingerprint report especially when there is enough other evidence to connect the appellant with the drugs.

[11] The Court of Appeal was clearly aware that it is trite law that an appellate court should be slow to interfere with the findings of fact by the trial judge. Reference was made by the Court of Appeal to the case of *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2004] 3 CLJ 737 wherein Abdul Hamid Mohammad, FCJ (as he then was) quoted a passage in the case of *Lai Kim Hon & Ors v. PP* [1980] 1 LNS 197: "... The principle of law governing appeals in criminal cases on questions of fact is well established, in that the Appeal Court will not interfere unless the balance of evidence is grossly against the conviction especially upon a finding of a specific fact involving the evaluation of the evidence a witness founded on the credibility of such witness."

[12] The learned DPP in his submission before us stressed on the point that upon being questioned by the customs arresting officer (SP3) as to the contents of the two sacks, the appellant himself had said it was "daun". This fact clearly shows that the appellant was aware of the nature of the contents of the two sacks. There was no mention by the appellant at that material time that he was not aware of the two sacks found conspicuously in his van.

[13] We also agree with the Court of Appeal that if the learned trial judge had taken into account the factors mentioned earlier, and properly weighed the defence of mere denial with that of the prosecution evidence, he would have come to a different conclusion. We find that the Court of Appeal had correctly interfered with the findings of facts made by the trial judge as the balance of evidence is grossly against the acquittal of the appellant. There was no misdirection by the Court of Appeal.

[14] We see no reason to interfere with the conviction imposed by the Court of Appeal. This appeal is therefore dismissed. The conviction and sentence on the appellant are affirmed.